BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended:

AND IN THE MATTER OF the complaint by Sandra Vander Schaaf, dated July 11, 1989 alleging discrimination in accommodation on the basis of marital status and sex.

B E T W E E N:

Ontario Human Rights Commission

- and -

Sandra Vander Schaaf

Complainant

- and -

M & R Property Management Ltd.
and Gerald Pearlstein

Respondents

DECISION

Adjudicator : Mary Anne McKellar

Date : September 6, 2000

Board File No: BI-0150-98

Decision No : 00-014

Board of Inquiry (*Human Rights Code*)
505 University Avenue
2nd Floor, Toronto ON M5G 2P3
Phone (416) 314-0004 Toll free 1-800-668-3946 Fax: (416) 314-8743
TTY: (416) 314-2379 TTY Tollfree: 1-800-424-1168

APPEARANCES

Ontario Human Rights Commission	)	Brian Eyolfson
Sandra Vander Schaaf	)	Bruce Porter

INTRODUCTION

On July 11, 1989, Sandra VanderSchaaf ("the Complainant") filed a complaint with the Ontario Human Rights Commission ("the Commission") in respect of herself and her room-mate, alleging that the Respondents had unlawfully discriminated against them on the grounds of sex and marital status in refusing to rent them an apartment ("the Complaint"). The Corporate Respondent named in the Complaint was M & R Holdings, but on consent of all the partics, the Board amended the Complaint on February 17, 1998 to show the proper name of the Corporate Respondent, M & R Property Management Ltd. The Personal Respondent named in the Complaint was Gerald Pearlstein.

THE ISSUES

The Complaint alleges that the Respondents discriminated against the Complainant and her female room-mate on the basis of marital status by initially refusing to provide them with a rental application because they were two single women and by subsequently refusing to apply the Corporate Respondent's income criteria to their combined income, which would have occurred had they been a married couple.

The Complaint further alleges that the use of income criteria has an adverse impact on female prospective tenants and young prospective tenants because the incomes earned by women and young adults are significantly lower than those of men and older adults.

DECISION

The Complaint succeeds on the grounds of discrimination on the basis of marital status and sex.

PROCEDURAL HISTORY

A significant amount of time elapsed betwecn the referral of the Complaint to the Board in February 1998 and the commencement of the hearing into the evidence on October 4, 1999. A

brief account of what transpired during that period is necessary to appreciate both the dynamic legislative and jurisprudential context in which this Complaint was referred for adjudication, and the Respondents' decision not to participate in the hearing by calling and examining witnesses or making legal submissions.

The Board received the Commission's referral of this Complaint on February 17, 1998. Following an initial conference call before Board Chair Gerry McNeilly on March 16, 1998, further proceedings were adjourned pending two events which could impact on the available remedies. Those events were the release of the decision in another case dealing with landlords' use of income criteria in screening rental applications ("the *Kearney* decision"), and pending amendments to the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended ("the *Code*") ("the *Bill 96* amendments").

By letter dated September 22, 1998, the Board advised that Gerry McNeilly would be unable to continue hearing the case and that it would be reassigned to another member.

On January 25, 1999, the Board forwarded to the parties a copy of the final decision in *Kearney* (December 22, 1998) (BI-0213-92; 0214-92; and 0216-92) (Leighton, John and Sims), and requested that they advise the Board if they consented to having the Complaint mediated. Consent to mediation was not forthcoming, and a Case Management Pre-Hearing Conference was scheduled to take place by way of conference call on May 19, 1999. Prior to the convening of this Pre-Hearing, a Notice of Appeal was filed in respect of *Kearney*.

All of the parties participated in the Case Management Pre-hearing Conference on May 19, 1999, and a memorandum issued on May 21, 1999 setting out the agreements reached with respect to the following: timeframes for the service and filing of Responses and Replies to the Commission's Statement of Facts and Issues; timeframes for the provision of disclosure by the Respondents; timeframes for identifying witnesses and the nature of their testimony; the order of presentation of evidence; and hearing dates commencing September 28, 1999.

On June 2, 1999 and June 22, 1999, Respondents' counsel wrote to the Complainant's representative seeking to determine if he consented to a further adjournment of the hearing pending the outcome of the appeal in *Kearney*. By letter dated July 22, 1999, the Respondent formally requested that the Board adjourn the hearing "to a date to be set following the completion of the appeals process in *Kearney*". By letter dated July 23, 1999, the Board advised the parties that the hearing was adjourned "on the condition that all parties undertake to abide by the Court's decision in *Kearney*", and directed that each party indicate to the Board in writing if it was prepared to make that undertaking. Following receipt and review of subsequent correspondence from the parties, the Board concluded that they were not prepared to provide the undertaking that was a precondition to the adjournment. In a letter dated August 3, 1999, the Board ordered "that the hearing proceed as scheduled".

On August 31, 1999, Respondents' counsel wrote to the Board advising that his client "will not participate in the hearing if it proceeds at this time". Portions of his letter were excised by the Board's solicitor prior to being provided to the adjudicator, with a marginal notation indicating that the excised portions "appear to disclose settlement discussions". Respondents' counsel also indicated that they were prepared to comply with the *Code* and the regulations thereunder, and to abide by the outcome of *Kearney* at the conclusion of the appeals process. In their view, the only thing at stake in the Complaint was the meaning to be ascribed to the *Bill 96* amendments and regulations promulgated thereunder, and they were content to let the Commission advance that argument.

By letter dated September 24, 1999, all parties consented to and requested that the hearing scheduled for September 28, 1999, be convened by way of conference call. The Board granted this request and the call commenced at 10:00 a.m. Although Respondents' counsel participated, he confirmed that he would not be attending on any subsequent hearing dates, nor would he be calling or examining witnesses, or making legal submissions. This position was subsequently reduced to writing in a letter dated October 1, 1999. The next scheduled hearing date was October 4, 1999.

On October 1, 1999, the Commission served and filed a notice of motion seeking to amend the complaint to add "age" as a ground of discrimination. In his letter of October 1, 1999 (referred to in the preceding paragraph), Respondents' counsel addressed this motion, writing:

> Please be aware that there is no evidence whatsoever that the Complainant was discriminated against by reason of her age. The Complainant did not address this issue in her complaint nor has there been any discussion about this in the more than 10 years since the complaint was filed. It appears the Commission wishes to add this as a ground of discrimination in order to try to make the evidence of Professor Ornstein more applicable.

At the outset of the hearing on October 4, 1999, the Board denied the motion to amend the complaint, ruling that a party is always free to argue a new basis of liability without amending a complaint, so long as it does not depend on the establishment of new factual allegations of which the respondent had no notice, the assertion of which could now cause prejudice.

No one attended the hearing on behalf of the Respondents on October 4, 1999, or on any of the subsequent hearing days.

THE FACTS

Witnesses

The adjudicative facts in this case were established through the testimony of the Complainant and Robert Searles, Regional Case Coordinator for the Commission, who was involved in the investigation of the Complaint. Additionally, the Board qualified two expert witnesses, Professor Michael Ornstein and Gary McIlravey. The specific areas in which they were qualified to proffer opinion evidence are set out later in this decision.

Ornstein and McIlravey also testified in the *Kearney* case. Indeed, the report Ornstein filed in *Kearney* was also filed in this Complaint and formed the backbone of his testimony. As for McIlravey, his expert report in this Complaint consisted of his 1997 submissions to the Standing Committee on General Government with respect to the *Bill 96* amendments dealing with the use of income information in tenant selection. In his testimony he indicated that his involvement before the Committee grew out of his involvement as an expert witness in *Kearney*.

It is clear from the procedural history of this Complaint and from the selection of experts who testified for the Commission that everyone involved acknowledged that this case was being litigated in the shadow of *Kearney*, the *Bill 96* amendments to the *Code*, and the regulations. The adjudicative facts – i.e. those tending to establish how these Respondents conducted themselves vis-a- vis this Complainant – can be briefly stated and are not particularly contentious. Before dealing with them, some discussion of the jurisprudential (*Kearney*) and legislative (*Bill 96*) contexts is warranted.

The Kearney decision

The *Kearney* decision considered whether three different landlords' reliance on minimum income criteria or rent/income ratios to reject the residential tenancy applications of three complainants contravened the *Code*. The complaints involved all arose in the period between September 1988 and September 1990. Although the personal circumstances of each individual complainant varied, the *Kearney* panel found that each belonged to a class of persons identified by a prohibited ground of discrimination, and that minimum income criteria disadvantaged persons in that class with respect to their ability to obtain accommodation. The panel further held that the respondent landlords failed to demonstrate that the use of rent/income ratios was a reasonable and *bona fide* business practice and that its cessation would result in undue hardship for them. The following paragraphs summarize the facts and evidence placed before the *Kearney* panel and the panel's reasons for decision.

The complainant Kearney was 17 years old, married, and pregnant when she and her 18-year old husband sought to rent a $600 two bedroom apartment in September 1988. Their application was denied and they were told both that they were too young and that they would need an annual income of $30,000 to qualify. At the time the complainant's husband was making $9.64 per hour.

The complainant Luis was black, the single mother of a four-year old child, and a recent immigrant to Canada when she sought to rent a $585 per month bachelor apartment in August 1990. Her monthly income was approximately $1500 - $1600, but she was told that she would need to make at least $2000 per month in order to qualify for the apartment.

The complainant J.L. was 16 years old when she and an 18-year old female friend sought to rent a two-bedroom apartment together in June 1990. The rent was $906 per month. After completing the application form and supplying cheques in respect of first and last month's rent, their application was denied by the property manager who advised that each of them had to be making over $32,000 per year to qualify. The decision offers no indication of the income, individual or combined, of the prospective tenants.

The three complaints together alleged discrimination on the grounds of sex, marital status, citizenship, place of origin, family status and receipt of public assistance. The rent/income ratios involved ranged from 24% (Luis) to 34% (J.L.).

The *Kearney* hearings occupied more than 60 days over a period of three years. In addition to witnesses with direct knowledge of the complaints, a number of experts testified, including Ornstein and McIlravey. The next few paragraphs contain a summary of the evidentiary conclusions that Ornstein and McIlravey reached which were accepted by the *Kearney* panel. The page references are to the pages in the unreported *Kearney* decision. These conclusions are similar to the ones these witnesses reached in the hearing into this Complaint. Their evidence in this proceeding, including the sources of their data, and the methodology they relied on in analyzing it and reaching their conclusions, are set out in this decision under the heading "The Expert Evidence".

With respect to the income level of equality-seeking groups, those findings of Ornstein's which were accepted by the *Kearney* panel and which appear most pertinent to the grounds of

discrimination alleged in this Complaint are the following:

- about two thirds of all unattached persons are under the age of 20;
- 68% of unattached women under the age of 20 have less than $10,000 in income; and
- 96% of unattached women under the age of 20 have less than $25,000 in income. (p. 17)

Ornstein then examined the impact of a 30% rent/income ratio on prospective tenants in equality-seeking groups. Among his conclusions, the *Kearney* panel accepted the following:

- one half of all unattached women are unable to meet the 30% income criterion applied to low rent accommodation; and
- 92% of all unattached women under the age of 20 do not have sufficient income to qualify for low rent accommodation. (p.19)

Finally, Ornstein provided the Kearney panel with actual rent/income ratio information for equality-seeking groups:

- between one quarter and a third of all tenants pay 30% or more of their income on rent;
- of those who pay more than 30% of their income on rent, they include: 37% of all unattached women . . . ; and
- unattached women with under $10,000 in personal income pay more than 70% of their income on rent, those under $20,000 in personal income pay 83% of their income on rent; and for those under $30,000 in personal income pay 50% of their income on rent.

McIlravey testified with respect to the impact of rent arrears on landlords. The *Kearney* panel accepted his evidence that he was unaware of any reliable studies establishing a link between rent/income ratios and default rates, as well as his conclusion that bad debt had a minimal effect on the viability of landlords' operations, amounting to only about .5% of gross income in large buildings. He concluded that factors such as fluctuations in property tax, mortgage or vacancy rates, or unexpected repair bills would have a much more significant impact.

The *Kearney* panel determined:

1. that each of the respondent landlords had used a rent/income ratio as a factor in assessing rental applications, and that the use of such factors constituted a "requirement, qualification or factor" under s.11 of the *Code*;

2. that using the factor resulted in the exclusion or restriction of a group of persons identified by a prohibited ground of discrimination; and

3. that each complainant was a member of one or more of the groups so excluded or restricted. (p.34)

With respect to the complaint of J.L. and the impact of the use of rent/income ratios on young unattached women, the *Kearney* panel wrote:

> There is clear evidence that the impact of rent/income ratios on young unattached women is significant. In Dr. Ornstein's statistical analysis he noted that 68% of unattached young women under the age of 20 have less than $10,000 in income. He concluded in his report that "young people are the hardest hit by income criteria. . . Young unattached persons are virtually excluded from accommodation limited by income criteria." (p. 38)

With respect to the membership of the complainants J.L. and Kearney in the group excluded or restricted on the basis of age and/or sex, the panel wrote:

> At the time J.L. applied at The Crossways she was a 16 year-old woman, a member of the group identified by "age" and "sex". (p.39)
>
> The evidence is clear that Ms. Kearney was 17 years old at the time that she and her husband, who was then 18, searched for an apartment in September 1988. She was pregnant. They were thus both members of the group identified as "young" in the analysis carried out by Dr. Ornstein. Further, as a pregnant woman, Ms. Kearney also came within the group of persons identified by "sex". (p.40)

Thus, the *Kearney* panel found that the use of rent/income ratios constituted a *prima facie* case of discrimination on the basis of age and sex contrary to s. 11 of the *Code*. It then examined the whether the respondent landlords had made out a defence to that *prima facie* case. The panel concluded that the respondents had failed to meet the onus of satisfying the Board that

rent/income ratios were reasonable and *bona fide* and that to relieve against their application would cause them undue hardship:

> It is the Board's conclusion that the practice of using a rent-to-income ratio is reasonable only if the use of such a ratio reduces a landlord's risk that tenants will default in the payment of rental obligations. The evidence presented by the respondents fails to show any connection between landlords' use of rent-to-income ratios and the reduction of the risk of default. Therefore, the landlords have failed to show that their use of rent-to-income ratios is related to a genuine business need. (p.49)

> . . . given the evidence that a substantial number of landlords do not use the rent-to-income ratios, and that some landlords appear to use the criteria selectively, the Board cannot conclude that landlords have an honest belief that applying rent-to-income criteria to applicants is necessary for the effective carrying out of business. Given the onus of proof, the Board finds that the respondents have not proven *bona fides*. (p.51)

> For essentially the same reasons outlined above – that the landlords have not proven that the use of rent-to-income ratios is reasonable, the landlords have failed to prove that ceasing the use of the ratios will cause them any hardship. The respondents have adduced no reliable evidence that the rate of default would be any different if landlords were to stop using rent-to-income ratios in tenant selection. Since the respondents have failed to show that discontinuing the use of rent-to-income ratios in tenant selection will increase the rate of default (or delinquency) by tenants, they have clearly failed to show that any hardship will be caused. Therefore, the landlords have failed to prove that undue hardship will result from discontinuing the use of income criteria. (p.52)

In the end, the *Kearney* panel declared:

> . . . that the use of rent-to-income ratios/minimum income criteria violate sections 2 (1), 4, 9 and 11 of the Human Rights Code whether used alone or in conjunction with other selection criteria or requirements. (p.61)

The Board ordered the respondents to cease and desist from using rent/income ratios in selecting prospective tenants, whether alone or in conjunction with other selection criteria or requirements.

Legislative amendments

When the *Kearney* hearing commenced and concluded, the only legislative provisions the panel had to consider were those contained in the *Code* itself. The *Kearney* panel found that

rent/income ratios contravened sections 2(1), 4, 9, and 11 of the *Code*. With the exception of s. 4, which relates to the rights of persons under 18 years of age and has no application to this Complaint, these provisions are set out below.

> 2(1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.
>
> 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.
>
> 11(1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.
>
> (2) The Commission, the board of inquiry or a court shall not find that a requirement qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.
>
> (3) The Commission, the board of inquiry or a court shall consider any standards prescribed by the regulations for assessing what is undue hardship.

Although s. 11(3) contemplates that regulations may be made specifying what constitutes undue hardship, and s. 48 (a) empowers the Lieutenant Governor in Council to make such regulations, none have ever been promulgated.

After the hearings in *Kearney* had concluded and while the panel was deliberating, the legislative landscape changed. *Bill 96*, although primarily aimed at amending residential tenancy

legislation, contained two provisions dealing with the *Code*. These provisions, as ultimately enacted in the *Tenant Protection Act*, S.O. 1997, c. 24, are:

36 In selecting prospective tenants, landlords may use, in the manner prescribed in the regulations under the *Human Rights Code*, income information, credit checks, credit references, rental history, guarantees, or other similar business practices as prescribed in the regulations under the *Human Rights Code*.

200 (1) Section 21 of the *Human Rights Code* is amended by adding the following subsection:

> (2) The right under section 2 to equal treatment with respect to the occupancy of residential accommodation without discrimination is not infringed if a landlord uses in the manner prescribed under this Act income information, credit checks, credit references, rental history, guarantees, or other similar business practices which are prescribed in the regulations under this Act in selecting prospective tenants.

(2) Section 48 of the Act, as amended by the Statutes of Ontario, 1994, chapter 27, section 65, is further amended by adding the following clause:

> (a.1) prescribing the manner in which income information, credit checks, credit references, rental history, guarantees or other similar business practices may be used by a landlord in selecting prospective tenants without infringing section 2, and prescribing other similar business practices and the manner of their use, for the purposes of section 21 (3).

Pursuant to these provisions, O.Reg. 290/98 was made on May 13,1998. It provides as follows:

> 1(1) A landlord may request credit references and rental history information, or either of them, from a prospective tenant and may request from a prospective tenant authorization to conduct credit checks on the prospective tenant.
>
> (2) A landlord may consider credit references, rental history information and credit checks obtained pursuant to requests under subsection (1), alone or in any combination, in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly.
>
> (3) A landlord may request income information from a prospective tenant only if the landlord also requests information listed in subsection (1).
>
> (4) A landlord may consider income information about a prospective tenant in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly only if the landlord considers the income information together with all the other information that was obtained by the landlord pursuant to requests under subsection (1).

(5) If, after requesting the information listed in subsections (1) and (3), a landlord only obtains income information about a prospective tenant, the landlord may consider the income information alone in order to assess the prospective tenant and the landlord may select or refuse the prospective tenant accordingly.

2(1) A landlord may require a prospective tenant to obtain a guarantee for the rent.

(2) A landlord may require a prospective tenant to pay a security deposit in accordance with sections 117 and 118 of the Tenant Protection Act, 1997.

3. In selecting a prospective tenant, a landlord of a rental unit described in paragraph 1, 2 or 3 of subsection 5 (1) or subsection 6(1) of the Tenant Protection Act, 1997 may request and use income information about a prospective tenant in order to determine a prospective tenant's eligibility for rent in an amount geared-to-income and, when requesting and using the income information for that purpose only, the landlord is not bound by subsections 1(3) and (4).

4. Nothing in this regulation authorizes a landlord to refuse accommodation to any person because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.

5. This Regulation comes into force on the day clause 48(a.1) of the Act comes into force.

The Adjudicative Facts

The Complainant testified that she was 23 years old and single at the time the Complaint was made in July, 1989. She graduated from university in May, 1987. In early 1988 she obtained what she referred to as her "first major job", earning $30,000 per year as a legislative assistant for M.P.P. Floyd Laughren.

Prior to the incidents alleged in the Complaint, the Complainant had been sharing rental accommodation with two female room-mates. One of them was getting married and moving out, so the other two, the Complainant and Marlene Suk, looked for another apartment to share. At the time Ms. Suk was earning $19,000 per year.

In June, 1989, the Complainant spoke to Harry Stewart, the Superintendent of The Windfields Place, an apartment building owned by the Corporate Respondent and located at 755 York Mills

Rd. In response to her inquiries about upcoming vacancies, she was shown a three-bedroom unit available July 1st, at a monthly rent of $755.

When the Complainant sought to complete a rental application in respect of the apartment, Mr. Stewart discouraged her from doing so. He advised her that the ideal tenants would be a middle-aged couple looking after an elderly parent, not two single people. The Complainant did not complete an application form at this time. She did, however, obtain the telephone number of the building's property manager, the Personal Respondent.

When the Complainant and Ms. Suk called the Personal Respondent's office the next day to inquire about renting the apartment, his secretary told them that they had to complete an application form. They went to Windfields Place on June 6, 1989 and completed the application form and provided a deposit cheque. On this occasion they spoke to both Mr. Stewart and his wife, Mary Stewart. Although the application and deposit were accepted by the Stewarts, it appeared to the Complainant that Mrs. Stewart was angry at having to deal with them because their application was doomed to be rejected.

The Complainant recalled that the application requested information respecting the following: bank accounts; driver's licence; personal references; place of employment; rental history; employment history; and income from employment. She did not recall being asked to provide any credit information.

A few days after submitting the application, Ms. Suk called the superintendent inquiring about its status. She was advised that it had been rejected, and when requested to know the reason, was told, "You should know why".

A couple of days following this conversation, the Complainant contacted the Personal Respondent by telephone. He advised her that the reason for the application's rejection was that neither individual applicant could afford to pay the rent if the two room-mates split up. Regardless of which one left, the other would be faced with paying more than 25% of her income on rent. When asked if the application would be treated differently if she and Ms. Suk had been

a married couple, the Personal Respondent said that he didn't know and didn't want to comment. He also rejected the Complainant's suggestion that she and Ms. Suk provide co-signors, saying he was not interested in that hassle.

Following these incidents, the Complainant contacted the Centre for Equality Rights in Accommodation (CERA), and spoke to someone who identified herself as Kelly Waddington. Ms. Waddington reported to the Complainant that she called the Personal Respondent and that he indicated to her that the Complainant's application had been rejected for failure to meet the required rent/income ratio.

The Complainant filed her Complaint with the Commission on July 11, 1989.

Robert Seales was the Commission's Regional Case Coordinator for the Toronto East Region in 1989-90. At the request of a Human Rights Officer assigned to the Complaint, he had a telephone conversation with the Personal Respondent on June 20, 1990. His contemporaneous notes of that conversation were made an exhibit to this proceeding. Seales testified that the Personal Respondent was of the view that the incomes of the Complainant and Ms. Suk did not meet the criteria to satisfy him that they could actually afford to pay the monthly rent, and that he feared that if the two split up, the remaining tenant would not be able to afford the rent. When Seales asked if the two applicants' incomes would have been combined if they had been married, the notes reflect that the Personal Respondent replied, "There is a great difference between single applicants and married applicants. The single ones <u>always</u> break up." (emphasis in original).

The apartment at Windfields Place was subsequently rented to a single woman whose income was higher than the combined income of the Complainant and Ms. Suk.

As for the Complainant and Ms. Suk, each ended up sharing accommodation with a different room-mate. They do not claim any special damages in respect of the Respondents' alleged infringement of the *Code*.

The Expert Evidence

Professor Michael Ornstein

Michael Ornstein obtained his doctorate in sociology from Johns Hopkins University in 1971. Since 1982 he has been the Associate Director of York University's Institute for Social Research. He is the chief statistical methodologist at the Institute and specializes in quantitative studies of inequality, particularly the extent to which parental inequality of income and education is passed on to children.

The Board qualified Professor Ornstein to proffer opinion evidence on:

> the impact of minimum income criteria in rental accommodation on equality seeking groups, but particularly groups identified on the basis of age, sex and marital status, which are the grounds of this Complaint.

Professor Ornstein provided an overview of the report he filed in *Kearney* as well as in this proceeding ("the Report"). Essentially, he said, it provided a statistical basis for answering two questions: are the housing choices of equality seeking groups significantly eliminated by the use of rent/income ratios; and are equality seeking groups disproportionately impacted by the use of rent/income ratios. In the context of this Complaint, unlike *Kearney*, the equality-seeking groups in question are restricted to those identified by their age and sex.

The consideration of two types of data enable the above questions to be answered: data respecting the distribution of income; and data respecting the distribution and cost of rental housing.

In examining the relationship between these data sets, Ornstein looks at households rather than individuals, because "the need for accommodation of adequate size and the resources available to pay the rent are characteristics of households, not individuals" (p.10) He examines the income distribution of six different types of households: unattached women; unattached men; female lone parents; male lone parents; couples in two-person households; couples in households with three or more persons. "Couples" in the Census data refers to opposite-sex couples.

Consequently, in this breakdown of households, the Complainant and her room-mate are unattached women.

As his source for data respecting income distribution, Professor Ornstein requested a custom tabulation of information provided by householders in the 1991 long-form Census. Actual completed Census questionnaires are not available to researchers because of concerns about confidentiality, so a custom tabulation is the only means of accessing the data contained therein.

As his source for data respecting the cost of rental housing, Professor Ornstein relied on information contained both in the 1991 Census and in Statistics Canada's annual survey of Household Incomes Facilities and Equipment, which includes detailed information on rents in specific housing markets.

In the introduction to the Report, Ornstein writes:

> One argument that may be advanced to favour the use of income criteria is that it prevents poor households from renting accommodation that is too spacious or too luxurious for their needs. It is therefore necessary to obtain information on the cost of units available for rent and to examine housing that is appropriate to the size of each household. The determination of the cost of rental accommodation that is to be compared with the incomes of equality seeking groups is based on the distribution of rents measured from Statistics Canada's Public Use Microdata File (or PUMF), which is a sample from the 1991 Census.
>
> Because rents are strongly related to the size of rental units, it will be necessary to decide what size accommodation should be considered for a given type and size of household. This is done by using the PUMF to analyze the relationship between the housing size and household composition. Once the average cost of rental accommodation is determined, it is possible to calculate the proportion of households in equality seeking groups that have sufficient income to qualify as renters, given a 30 percent (or any other) income criterion. (p. 2)
>
> ... the proportion of households living in accommodation costing more than 30% of their income is a direct indicator of the relative vulnerability of a group to the adverse effects of income criteria. (p.3)

Consequently, he organizes the data in tables that enable the following four questions to be answered:

1. How big are the apartments where the various households actually live? A consideration of the data responsive to this question provides the basis for reaching conclusions about what size accommodation is appropriate for various households.

2. For rental units of a given size, what is the range of rents charged? A consideration of the data responsive to this question provides the basis for reaching conclusions about what constitutes reasonable rent for an apartment that is appropriate in size for a particular household.

3. What is the household income of equality-seeking groups? A consideration of the data responsive to this question provides the basis for reaching conclusions about the ability of such households to secure reasonably-priced rental housing of an appropriate size.

4. What percentage of their annual income do such households spend on rent? A consideration of the data responsive to this question provides the basis for reaching conclusions about the vulnerability of equality-seeking groups to the adverse effects of income criteria.

The data contained in Table 8 appended to the Report is responsive to question 1 above. It breaks down the percentage of rental units of specified sizes that were occupied by each household type in 1990. Although the data differentiates the size of apartments by number of rooms, rather than by designations such as one-bedroom or two-bedroom etc., Ornstein noted that the number of rooms less two equals the number of bedrooms. Table 8 shows that 73.5% of all households comprised of two unattached persons rented an apartment with four or more rooms (a two-bedroom unit) and that 42.5% of such households had an additional room. In his testimony, Ornstein indicated that an appropriate size of apartment for two unattached persons would be a two-bedroom unit.

It will be recalled that J.L., one of the complainants in *Kearney,* was an unattached women who sought to rent a two-bedroom apartment with another unattached friend. The Report contains the

following remarks about J.L.'s situtation:

> For unattached persons, only accommodation for one person is considered. As the case of [J.L.] indicates, the imposition of income criteria on two or more unattached persons can easily work to their disadvantage, when the requirement is that *one* of the prospective tenants have sufficient income to rent the place on his or her own. . . . . A reasonable expectation is that a single person should have accommodation with three rooms, effectively a one-bedroom apartment; more than 80% of people living alone have at least that much space, and nearly half have at least one additional room. (p.39 emphasis in original)

I will come back to the significance of these remarks in that portion of this decision appearing under the heading, "Analysis".

With respect to question 2 posed above, in determining what is a reasonable rent for accommodation of various sizes, Ornstein writes:

> Personal standards of taste are important determinants of what is acceptable accommodation, and the quality of apartments is strongly correlated with their rents. Furthermore, the complexity and diversity of the stock of rental accommodation, not to mention rent controls, means that there is considerable variation in the value that tenants receive for their money. In order to allow for this variation, three different scenarios are used for the cost of accommodation in calculating the impact of income criteria on equality seeking groups. For the *very low rent* scenario, the rent is set at the 15^{th} percentile of the distribution for apartments, that is roughly one sixth of all units of the same size rent for less than the amount used and five-sixths rent for more; for *the low rent* scenario, the rent is set at the 30^{th} percentile; and for the "median" rent scenario, the rent is set at the 50^{th} percentile. (at p. 40 emphases in original)

Table 7 appended to the Report shows the distribution by rent of various sizes of apartments in Toronto in October 1990 in $100 increments. This data shows that 94% of two-bedroom and 84.4% of three-bedroom apartments were renting for less than $1000 monthly. 92.1% of all bachelor apartments and 73.9% of one bedroom units rented for less than $600 monthly, while 96.9% and 85.9% respectively of apartments that size rented for under $700 monthly. 78.5% of all bachelor apartments and 45.2% of one bedroom units rented for less than $500 monthly.

Acceptance of the data set out in Table 11 is premised on acceptance of Ornstein's methodological decision to consider only one-person households of unattached persons, as well as his empirical conclusions that a one-bedroom apartment is the appropriate size for such a household, and that very low rent, low rent and median rent categories should be defined by the 15^{th}, 30^{th} and 60^{th} percentile of rent charged for a unit of a given size. If those premises are accepted, what Table 11 shows is that the range of rents (from low rent to median rent) for an apartment appropriate to an unattached person vary from $467 to $600 monthly. At a 30% rent/income ratio, the range of annual salary required would vary between $19,000 to $24,000.

Tables 1A and 2 appended to the Report contain the income distribution data that is relevant to this Complaint, and will be of assistance in answering question 3 above. It will be recalled that the Complaint alleges discrimination on the basis of sex, age and marital status.

Table 1A breaks down annual income between $10,000 and $39,999 into increments of $5,000. Although it reveals that 70% of unattached women in Toronto in 1990 had an annual income of less than $30,000, compared to 61% of unattached men, most of that difference is located in a single salary range, $10,000 to $14,999 (13% of men versus 22% of women). Over all other salary categories up to $34,999, the distribution of income for households of unattached persons does not vary more than 1% by sex. Fully 60% of couples in two-person households earned $40,000 or more.

Table 2 provides data respecting income distribution by type of household by age. Only three age groups are considered: under 20 years; 20-24 years; and 25 years or more. In the Report Ornstein acknowledges that "just who is a young person . . . is somewhat arbitrary. In this report, 15-19 year olds and 20-24 year olds are considered separately as two groups of young people." (at p.12). Table 2 shows that only 1% of unattached women under 20 years of age and 6% of unattached women under 24 years of age earned $30,000 or more in 1990. 10% of all unattached women over 25 years of age fell within this income category (Table 2). In response to a

question from the Board during his testimony, Ornstein acknowledged that for all income earners, regardless of gender, income tends to increase with age, at least up until the age of normal retirement. Generally, twenty-year old persons would tend to earn more than nineteen-year old persons, and twenty-two year old persons would earn still more. He also acknowledged that the income distribution would be different if he had chosen, for example, a category of those 22-26 years of age.

Table 12 relates the income distribution data for unattached men and women by age with the Table 11 data (discussed above) to show what percentage of them would meet or exceed minimum income requirements if a 30% income/rent ratio were applied. It shows that 39% of unattached women between 20 and 24 years of age would qualify for very low rent accommodation, 35% for low rent accommodation, and 25% for median rent accommodation. For unattached men of the same age, the corresponding figures are 43%, 40% and 31%. For unattached women 25 years of age or more, the figures are 55%, 53% and 46%. For unattached men 25 years of age or more, the figures are 64%, 62%, and 56%. Ornstein testified that no matter what particular rent/income ratio is used, more men than women will always qualify for housing.

Table 17 provides the data required to address question 4 above respecting the percentage of their annual income that renters actually spend on rent. Only 47% of all unattached women spend less than 25% of their annual income on rent. The larger the woman's income, the more likely it is that she spends a smaller percentage of it on rent. Thus, 73% of unattached women making $30,000 or more annually spend less than 25% of their income on rent, and this figure jumps to 91% for unattached women earning $40,000 or more. By contrast, only 27% of unattached women earning less than $20,000 annually spend less than 25% of their income on rent. Indeed, 59% of them spend 30% or more of their annual income on rent.

In the three-page Addendum, Ornstein discusses the applicability of the evidence contained in the Report to the facts of this Complaint. In it he writes:

> In my view, the finding that **half** of all low income housing is inaccessible to unattached women, compared to 40 percent inaccessible to unattached men, and **less than one quarter** inaccessible to couples is clear evidence of the adverse effect of income criteria on unattached women. . . . the use of a stricter criterion, such as the criterion that rent should be no more than 25 percent, rather than 30 percent, of income *increases* the *dis*advantage of unattached persons relative to couples and of unattached women relative to unattached men. (p. 2 emphases in original)
>
> The present complaint involves two women with annual incomes of $30,000 and $19,000. The woman with the higher income did not, on her own, have the income of $36, 240 required to qualify as a tenant, the figure obtained by applying a 25 percent income criterion to the $755 monthly rent. The figures cited above refer to unattached individuals renting accommodation alone, but in the Report I also note that "the imposition of income criteria on two or more unattached persons can easily work to their disadvantage, when the requirement is that *one* of the prospective tenants have sufficient income to rent the place on his or her own" (p.39). The strange consequence of applying income criteria in this way is that doubling up to share accommodation makes it *more* difficult for a single person to qualify for rental accommodation restricted by income criteria. (p. 3 emphases in original)

Gary McIlravey

Gary McIlravey is a principal of Proof Positive Real Estate Research, which provides market research services and advice related to all forms of residential development. This is a field in which he has fifteen years of working experience, much of it focussed on assessing condominium and rental apartment markets and financial viability for builders, developers, government, service suppliers and planners. He has been qualified as an expert witness to provide housing market testimony before the Ontario Court of Justice, the Ontario Municipal Board and the Board of Inquiry (Human Rights Code). The Board qualified Gary McIlravey as an expert in housing market analysis to proffer opinion evidence on

> tenant selection practices, including minimum income criteria and their impact on default costs and on the viability of individual landlords' businesses.

The foundation for McIlravey's testimony in this proceeding was his June 26, 1997 written submissions to the Standing Committee on General Government with respect to sections 36 and 200 of Bill 96, which proposed to amend the *Code* to provide explicitly for the consideration of income information in tenant selection. Specifically, his submissions addressed the following issue: "whether, in fact, there is any justification from a business standpoint, in landlords disqualifying low income applicants on the basis of income information". The factual basis for his submissions derived from his earlier research and testimony in *Kearney*. He summarized the research methods he employed and the results obtained:

> . . . I conducted a survey of landlords to determine what percentage of various types of landlords actually use income information in selecting prospective tenants. I also reviewed survey data from landlord and tenant court to determine the risk of default in the tenant population. On the basis of data from the landlord and tenant court and fee schedules from professional eviction services, I was able to estimate the average legal and arrears costs arising from default. I also examined financial statements from residential rental properties to determine the significance of default in determining the over-all profitability of the enterprise.
>
> As a result of my research I concluded that the use of income screening or income criteria is not justified from a business standpoint. A primary reason behind this conclusion was that income criteria is believed to be a way of reducing the level of default in rental apartments, but our research showed that the costs of tenant default and evictions had an insignificant effect on the amount of profit returned by the rental business.

McIlravey noted that there are no reliable studies linking high rent/income ratios with a propensity to default. He also noted that the materials used in the formal education of persons enrolled in the certificate program of the Toronto Property Management Association outline a number of tools to be used in assessing prospective tenants, but that rent/income ratios are not among them. McIlarvey also conducted a telephone survey of 183 landlords who advertised apartments in the *Renter's News* in March/April 1994. Virtually all landlords (95% or more) checked tenants' references, contacted their employer, and required first and last month's rent at the outset of the tenancy. Only 28% of those surveyed used income as a means of qualifying tenants. The landlords who did use rent/income criteria were most likely to be renting townhouse units, or apartments in buildings of more than five stories. In other words, larger or corporate landlords were more likely to use income criteria.

McIlravey also examined how significant a factor default is in the overall financial viability of a rental business. Based on a 1984 survey by the Residential Tenancies Commission, he determined that bad debt arising from default is almost always less than 1% of gross income, and is only .5% of gross income in buildings with more than fifty units. The annual per unit costs of default that these percentages represent are $25 and $22 respectively. By contrast, annual insurance costs ($25 - $50/unit), property taxes (20-25% of gross income), utilities ($900-$1200/unit), repairs and maintenance ($300-$600/unit), and property management fees (4% of gross income) each represent a much larger portion of gross revenue, such that a fluctuation in the cost of any of them will have a more significant impact on the financial viability of the business than will a fluctuation in the rate of default. Taking into account the rate of eviction proceedings commence and the legal costs that may be associated with the eviction of a defaulting tenant, McIlravey estimated a cost per default of $1627, including legal fees and arrears, representing approximately .6% of gross revenue of a typical apartment building. This figure is probably higher than the actual average cost/default because it assumes that no arrears are recovered.

In response to a question from the Board, McIlravey indicated that he did not attempt to gather data on, or assess the financial impact to landlords of any increased tenant turnover occasioned by low income tenants who vacate premises when they have difficulty meeting the rent but who do not default.

McIlravey concluded:

> Tenant default on rent is not a significant cause of business failure in the residential rental business . . . . my advice to landlords would be that income criteria are not a reasonable business practice. Qualifying applicants on the basis of references and credit checks makes good business sense. I am not suggesting that landlords should not try to reduce default as much as possible, however small the savings. But disqualifying large segments of the tenant population on the basis of income criteria does not make good business sense. . . . the practice of income criteria potentially creates additional costs to the landlord, by restricting demand and increasing vacancy, rather than creating any significant savings in the area of bad debts. In 1993, for example, Bramalea lost twenty times more in vacancy loss than in bad debt. Their requirement of a 25% rent-to-income ratio however, disqualified over half of the households in the Metro Toronto Census area who were currently renting similar apartments at a similar rent. This is not, in my view, a sound business practice.

THE PARTIES' POSITIONS

The incidents alleged in the Complaint were pretty much contemporaneous with the incidents considered in *Kearney*. They predate both the legislative changes that occurred while the *Kearney* panel was deliberating, and the *Kearney* decision itself.

The Complainant and Commission take the position that, in considering whether a right of the Complainant's under the *Code* has been infringed, I should look to the statutory regime in place at the time those incidents occurred. That is the same statutory regime considered in *Kearney*. They also urge that I find on the evidence that the Respondents relied on rent/income criteria in rejecting the Complainant's rental application, that the use of such criteria constructively discriminated against her as a young woman, and that the practice was not defensible under the *Code*. In other words, they urge me to find that this case is on all fours with *Kearney*, and the issue of whether a contravention occurred should be resolved in the same way it was in that case. In their submission, the post-Complaint legislative changes ought to be considered only in fashioning a remedy to prevent future contraventions of the *Code*. The Commission and the Complainant differ, however, with respect to how these legislative changes are to be interpreted. Their specific positions on the interpretive question are identified in the course of the Analysis below.

As noted earlier, the Respondents did not attend the hearing. They did, however, set out their position in a letter dated October 1, 1999. In this letter, the Respondents purport to set out not only their position with respect to various issues before the Board, but also their understanding of the positions taken by the Complainant and the Commission. These parties objected to the Respondent's characterization of their positions as both inaccurate and as having been communicated on a without prejudice basis. Regardless of whether the Respondents have accurately captured the Commission's position with respect to the impact of the legislative changes, they have clearly indicated their understanding of that position, and adopted it. Consequently, the Respondent's stated position is that O.Reg 290/98 permits it to request income information if it first requests credit references and rental history, and that it may consider the former information only if it also considers the latter, except in circumstances where all three

types of information are requested but only income information is received. In that situation, the landlord may consider the income information alone. Consideration of income information may include the use of rent/income ratios. Furthermore, landlords must consider the income information from all prospective tenants in the same fashion regardless of whether they are spouses or not. The Respondents further agree "to act in strict accordance with the law as determined in *Kearney* following the completion of the appeal process".

In a letter dated August 31, 1999, the Respondents' counsel stated "My client has accepted that it used income criteria in deciding to rent to someone other than the complainant".

ANALYSIS

Direct discrimination on the basis of marital status

The Complainant testified that the superintendent of The Windfields initially refused to accept her rental application on the basis that the landlord preferred to rent an apartment of the size in question to couples. She further testified that when she did complete and submit an application, the superintendent's wife appeared angry at having to deal with it and the Complainant concluded that she felt it was a waste of her time as an application from two single women was destined for rejection. Furthermore, when the Complainant inquired as to the reason for the rejection of her application, she was told, "you should know why". At this point, there had been no mention of rent/income ratios. The Complainant's evidence was uncontradicted and I accept it. I find that the Corporate Respondent contravened sections 2(1) and 9 of the *Code* when its agents, the Stewarts, initially refused to provide the Complainant with a rental application on the grounds of her marital status.

The Complainant and Ms. Suk together earned $49,000 annually. The apartment they sought to rent was offered at $755/month or $9060 annually. $9060 represents 18.5% of their combined annual income, but 30.2% of the Complainant's individual $30,000 annual income. The Respondent conceded that it used income criteria in refusing to rent to the Complainant and Ms. Suk. The uncontradicted evidence was that the rent/income ratio applied was 25%, and that the Respondent required that one of the prospective tenants possess income sufficient to satisfy that

criterion. This is consistent with the Respondents' concession. There was further uncontradicted evidence from which the Board concludes that a rental application from spousal co-tenants would have been treated differently by the landlord, who would have considered whether their combined income satisfied its rent/income ratio. The Board finds on the basis of the above facts that the Respondents directly discriminated against the Complainant on the grounds of marital status with respect to the provision of accommodation, contrary to s. 2(1) of the *Code*.

Constructive discrimination on the basis of age and sex

Framework of the analysis

The Commission and the Complainant also contend that the use of rent/income ratios disadvantage the Complainant as a young woman, and are not reasonable and *bona fide* business practices, the cessation of which would cause undue hardship to the Respondent. They say the case is on all fours with *Kearney* and should be decided the same way, insofar as the finding of a contravention is concerned.

The Board adopts the three-step approach to the issue of *prima facie* contravention set out in *Kearney*, and summarized above in this decision. Briefly stated, those three steps are: (1) Does the rent/income ratio constitute a requirement, qualification or factor under s. 11 of the *Code*? (2) Does the use of the factor result in the exclusion or restriction of a group of persons identified by a prohibited ground of discrimination? (3) Is the Complainant a member of one or more of the groups so excluded or restricted?

With respect to question (1), the Board agrees with the *Kearney* panel that the use of rent/income ratios constitutes a requirement, qualification or factor under s. 11 of the *Code*. Consequently, in the event that it answers questions (2) and (3) affirmatively, the Board concludes on the basis of the evidence proffered to it by McIlravey and the analysis in *Kearney*, that the Respondents have failed to establish that the use of rent/income ratios constitute a reasonable or *bona fide* business practice, the cessation of which would cause them undue hardship.

The task before the Board, then, is to apply steps (1) and (2) of the *Kearney* approach to these adjudicative facts.

Discrimination on the basis of age

There are two specific questions to be addressed under this heading. Do rent/income ratios exclude or restrict "young persons" from access to rental housing? Is the Complainant a "young person"?

The two complainants in *Kearney* who alleged that rent/income ratios discriminated on the basis of age were both under 20 years of age. The *Kearney* panel accepted Ornstein's conclusion that "unattached persons under the age of 20 are virtually excluded from accommodation limited by income criteria". Based on the evidence before it, the Board would reach the same conclusion in this case. That conclusion, however, is of no assistance to the Complainant, who was 23 years old at the time her rental application was rejected. For her Complaint of discrimination on the basis of age to succeed, the Board must conclude that Ornstein's evidence also establishes that rent/income ratios disadvantage persons of her age. The Board is unable to reach this conclusion based on the evidence presented. The only other age group for which income distribution data was provided comprised persons 20 –24 years of age. The Complainant was clearly close to the upper limit of the 20-24 group at the time of her Complaint. The age-group boundaries were conceded to be arbitrary, and it was acknowledged that the income distribution for older members of the 20-24 age group would more closely resemble that of the over-25 group. Including all persons 25 years of age or over in the same category suggests that low income ceases to be meaningfully correlated to youthfulness at about age 25, and indeed, Ornstein testified that low income is also associated with old age. At the very least, it prevents a determination of the extent to which those two factors are correlated. Without being able to determine that question it is impossible to assess whether rent/income ratios operate to the disadvantage of tenants aged 20-24 based on their youthfulness.

In summary, although rent/income ratios disadvantage unattached young persons under 20 years of age, the Complainant was not a member of this disadvantaged group. There was an

insufficient evidentiary basis on which the Board might conclude that the age group of which she was a member was an appropriately-drawn one, or that members of this group were disadvantaged vis-à-vis older persons by the application of rent/income ratios.

The Complaint is dismissed insofar as it alleges that the Respondents' use of rent/income ratios discriminated against the Complainant on the basis of age.

Discrimination on the basis of sex

Once again, the Board must address two questions. Do rent/income ratios disproportionately exclude or restrict a group of persons identified by their sex from access to rental housing? Is the Complainant a member of that group?

The Board follows *Kearney* in concluding on the basis of Ornstein's evidence that income distribution is such that unattached women are disadvantaged relative to unattached men where access to rental housing is predicated on the satisfaction of rent/income ratios. Consequently, a group identified by the prohibited ground of sex is restricted in its access to accommodation by the use of such ratios. Notwithstanding that the Complainant herself earned a comfortable income at the time of her Complaint, she is nevertheless a member of that group.

Nexus between the denial of rental housing and the rent/income ratio

The Complainant's annual income at the time of her rental application placed her in the top 30% of all unattached women. 38% of all unattached men earned as much or more than she did. If her income alone is considered, she qualified to rent somewhere between 73.9% and 85.9% of all accommodation appropriate to the size of her household (i.e. a one-bedroom unit) in Toronto.

The apartment the Complainant and Ms. Suk did seek to rent exceeded the reasonable needs of their household, according to Ornstein. It was a three-bedroom apartment, and he testified that a two-bedroom unit would be appropriate for two unattached persons forming a single household.

The Complainant's representative submitted that the fact that his client was better off than most women and still failed to qualify for the apartment of her choice highlighted the disadvantage that rent/income ratios occasion to women as a whole. The Complainant was likened to Tawney Meiorin, the female British Columbia firefighter who lost her job when she failed to meet the aerobic standard specified in a new fitness test. She passed the other three elements of the fitness test, but although her aerobic capacity was arguably greater than that of most women, Ms. Meiorin failed to complete a 2.5 km run in the specified time. The test was found to discriminate against women, and was not shown to be reasonably necessary to the safe and efficient performance of the work. See *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.* (1999), 176 D.L.R. (4th) 1 (S.C.C.).

The real difficulty in this case is not whether the Complainant belongs to a group disadvantaged by the use of rent/income ratios, but rather whether there exists a causal connection between her failure to obtain the apartment and the impact of those ratios on the group to which she belonged. Had the Respondents' rent/income ratio been correctly applied to the combined income of the Complainant and Ms. Suk, they would have qualified for the apartment. Her own income would have qualified her to pay a rent of $625 on the Respondents' rent/income ratio, so she may well have been a successful applicant for a one-bedroom unit in The Windfields. She failed to obtain the $755 three-bedroom apartment, not because rent/income ratios constructively discriminate against women (which they do), but because the Respondents applied their rent/income ratio in a way that directly discriminated on the basis of marital status.

The question of causation goes to the issue of appropriate remedy. The parties have no dispute on the facts. The Respondents concede that they applied a rent/income ratio in denying the Complainant the apartment. Nor did the parties dispute the correctness of *Kearney*. Although that decision is under appeal, the Respondents agreed to be bound by the final outcome of all appeals. The parties here locked horns over whether in the circumstances of this case the legislative changes need to be interpreted, and how they should be interpreted. This was a fight about the nature of the prospective remedies the Board should order. This is a matter on which it obviously would have been beneficial to have had the assistance of submissions from the Respondents. In the absence of that assistance, and in a case which only remotely engages the

discriminatory aspects of rent/income ratios, the Board is reluctant to engage in that interpretive exercise. If not for the following facts, the Board would not address the issue:

- There is clear evidence that rent/income ratios do restrict women (a group identified by a prohibited ground of discrimination) from access to rental housing;

- The foregoing was held in *Kearney* to constitute a contravention of the *Code* and there do not appear to have been any issues in that case with respect to causation;

- *Kearney* is under appeal, the hearing of which is scheduled for Fall, 2000;

- The legal framework was altered while the *Kearney* panel was deliberating, and that alteration has a potential impact on the applicability of that decision to subsequent cases, including the range of available prospective remedies in this case;

- It may be expeditious to provide the landlord/tenant community with the opportunity to have the Court deal with not only the substance of *Kearney*, but with how to reconcile it with the legislative amendments;

- A Board decision dealing with the applicability and interpretation of the legislative amendments will provide the necessary context for the consideration of above questions.

Although the Board has determined that there may be some utility to its commenting on the impact of the amendments, the fact that it has found the rent/income ratios here were not causally connected to the Complainant's failure to get the apartment means that these comments are *obiter*.

The legislative amendments and Kearney

Section 2(1) of the *Code* guarantees equal rights in accommodation without discrimination "because of" various proscribed grounds. The only prohibited ground of discrimination under consideration at this point in this decision is sex. Accordingly, the following paragraphs refer only to that ground.

Section 2 is found in Part I of the *Code*, which also contains s. 9, prohibiting persons from "directly or indirectly" infringing "a right under this Part". Although s. 11 is found in Part II of

the *Code*, pursuant to it, Part I is infringed where a factor that "is not discrimination on a prohibited ground" results in the exclusion, restriction or preference of a group identified by a prohibited ground of discrimination, except where the factor is reasonable and *bona fide* and the needs of the group cannot be accommodated without undue hardship". *Kearney* found that the use of rent/income ratios came within the description of behaviour proscribed by s. 11 with the consequence that the use of those ratios contravened the complainants' rights under Part I of the *Code*. In the "Order" portion of its decision, the panel declared that rent/income ratios (used alone or in conjunction with other factors) "violate sections 2(1), 4, 9 and 11 of the *Human Rights Code*, whether used alone or in conjunction with other selection criteria or requirements".

Section 21(3) of the *Code* now provides that the *Code*'s guarantee of equal treatment with respect to accommodation is not infringed by a landlord's use of income or other information in accordance with the regulation. Neither the *Code* nor the regulation defines "income information". Section 21(3) appears in Part II of the *Code*, under the heading, "Interpretation and Application". Because s. 21(3) constitutes an exception to the guarantees in the *Code*, it must be construed narrowly.

O.Reg. 290/98 provides that a landlord can request and consider "income information" as long as it also requests and considers rental history and credit references. If the latter information is not forthcoming, the landlord can consider income information alone. Section 4 of the regulation expressly states that nothing in it authorizes a landlord to refuse accommodation "because of" various proscribed grounds of discrimination. These proscribed grounds of discrimination are the same as the ones set out in s. 2(1) of the *Code*, and the grammatical structure of s. 4 of O.Reg. 290/98 is identical to that of s. 2(1) of the *Code*.

It is difficult to reconcile the amended *Code* and regulations with the decision in *Kearney*, no doubt because the former antedated and anticipated the latter. Both the Commission and the Complainant struggled valiantly to do so.

Both the Commission and the Complainant agreed that the term "income information" is broad enough to encompass information about the amount, source, and steadiness of a potential tenant's income. The Commission submits that O.Reg. 290/98 insofar as it allows landlords to consider "income information" permits them to apply rent/income ratios. The Complainant, on the other hand, while conceding that a landlord may obtain information respecting the amount of a potential tenant's income, argues that the landlord is not permitted to apply a rent/income ratio. The question of what meaning to ascribe to "income information" can only be answered having regard to the whole of O.Reg. 290/98. At this point, however, the Board notes that it would have been a simple matter for the legislature to have clearly indicated if it intended to permit landlords to use rent/income ratios by employing that express language in the regulation. The Board also notes that during the Standing Committee on General Government hearings into *Bill 96*, Government members of the Committee offered repeated assurances that it was not the Government's intention to authorize the use of a 30% rent/income ratio, but that their intention was confined to clarifying what information landlords could request from prospective tenants.

The Commission also submits that where landlords receive rental history, credit references and income information, they must consider each type in a meaningful way and may not "use minimum income criteria as an absolute cutoff in the absence of consideration of the other information prescribed in the Regulation, where such information is available". As well, the Commission submits that there is a distinction between "negative credit references or negative rental history and no credit references or no rental history". Some protected groups may have an absence of such information and the Regulation does not permit a landlord to refuse to rent to a person on the basis that credit references and rental history do not exist. This issue does not arise on the facts of this case, and the Board refrains from comment on this aspect of the interpretation of O.Reg. 290/98.

The real difficulty with interpreting O.Reg. 290/98 is determining what meaning to ascribe to s.4. The Commission submits that this section, read in the context of the *Code* as a whole and *Kearney*, precludes a landlord from refusing to rent "directly because of a prohibited ground". The Board disagrees for several reasons. First, if that had been the legislative intention, it would have been much easier to say so plainly. Second, the Supreme Court of Canada *in Ontario*

Human Rights Commission and O'Malley v. Simpsons-Sears (1985), 7 C.H.R.R. D/3102 found that a prohibition on discrimination employing the same grammatical structure as that found in s. 2 of the Code and s. 4 of O.Reg. 290/98 was not limited to prohibiting direct discrimination only. Rather, it also prohibited adverse effect discrimination. Third, reading s. 4 of O.Reg. 290/98 to prohibit direct discrimination only renders it utterly redundant since s. 2(1) of the *Code* already makes it unlawful to directly discriminate on the basis of a prohibited ground. That protection against direct discrimination is not undermined by permitting the use of rent/income ratios, rental history or credit references, all of which *Kearney* held to be neutral rules or factors that could be applied in a non-discriminatory fashion, but which nevertheless could constitute unlawful discrimination under the *Code* where they resulted in the exclusion, restriction or preference of a group identified by a prohibited ground of discrimination. Fourth, the Supreme Court of Canada in *Meiroin* identified the difficulties associated with analyses of discrimination that rely on the distinctions historically drawn among behaviours described as direct, indirect, constructive, adverse effect or systemic discrimination.

> The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify, simply because there are few cases that can be so neatly characterized. For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterized as either directly discriminatory (because it means that no workers whose religious beliefs preclude working on Fridays may be employed there) or as a neutral rule that merely has an adverse effect on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays). On the same reasoning, it could plausibly be argued that forcing employees to take a mandatory pregnancy test before commencing employment is a neutral rule because it is facially applied to all members of a workforce and its special effects on women are only incidental. (at Para. 27)

In view of all of the above, the Board is reluctant to read s. 4 of O.Reg. 290/98 as creating a distinction between direct and indirect discrimination where the statutory language in question does not absolutely and expressly compel it.

The Complainant's representative submitted that s. 4 of O.Reg 290/98 prohibited all discrimination. He argued that its effect was to preserve the outcome in *Kearney*. In his view, O.Reg. 290/98 as a whole allowed landlords to request and use certain information, but required that they do so reasonably, and not in such a way as to contravene the *Code*. Hence his urging

that a landlord's "consideration" of income information could not include the application of rent/income ratios, because they had been shown in Kearney to have no correlation with risk of default. Despite repeated questioning, he would not concede that any reasonable rent/income ratio could be specified. Although he described the regulation as "circular", the Complainant's agent did not describe it as repugnant to the *Code* and ineffective on that basis.

It seems to the Board that there are three possible solutions to the conundrum of how to reconcile the *Code*, *Kearney* and O.Reg. 290/98. The first is to declare that the legislative changes are so hopelessly circular that it is impossible to ascribe meaning to them. On this reading, O.Reg. 290/98 is repugnant to the *Code* and cannot stand. The second possibility is that because the easiest to satisfy rent/income ratio considered in *Kearney* was 34% and it was found to contravene the *Code*, what the amendments and *Kearney* now mean is that landlords are prohibited from applying rent/income ratios of less than 35%, but may apply ratios larger than that, subject to the risk of those ratios being found to contravene the *Code*. The problems with this approach, however, are that the expert evidence here demonstrated that **all** rent/income ratios disproportionately disadvantage groups of persons identified by prohibited grounds of discrimination, and that the *Kearney* panel appeared to declare that all rent/income ratios contravene the *Code*. The third possibility, and the one I prefer, is to find that permitting landlords to obtain "income information" from prospective tenants does not permit them to apply rent/income ratios, all of which *Kearney* found contravened the *Code*. On balance, therefore, I adopt the Complainant's interpretation of "income information" to that offered by the Commission. I observe, however, that even this interpretation leaves open the possibility that sophisticated landlords may attempt to prefer higher-income applicants without contravening the *Code*, by "eyeballing" the relationship between income and rent, but not actually crunching the numbers.

OPINION RESPECTING COMPLIANCE WITH *BILL 96*

The Respondent is, of course, required to comply with the provisions of the *Code* and its regulations. I have offered my interpretation of what such compliance requires insofar as the continued use of rent/income ratios is concerned. Although the Board declines to make any orders respecting the Respondent's use of rent/income ratios because it has not found in the

circumstances of this case that they resulted in any discrimination or disadvantage to the Complainant, had the Board found a necessary causal connection between the rent/income ratios and the Complainant's failure to obtain the apartment, it would have been inclined to make the following remedial orders conforming to its interpretation of the *Code* and O.Reg. 290/98:

(1) that the Respondents cease and desist from requesting income information from prospective tenants, except to the extent that they also request information respecting rental history and credit references; and

(2) that the Respondents cease and desist from applying rent/income ratios in selecting tenants.

ORDER

The Board orders:

(1) that the Respondent cease and desist from preferring tenants based on their marital status;

(2) that the Respondent cease and desist from applying different criteria to the assessment of rental applications from co-tenants based on their marital status;

(3) that the Respondents pay to the Complainant the sum of $2500 inclusive of pre-judgment interest as general damages in respect of her loss of the right to be free from discrimination.

Dated at Toronto this 6th day of September 2000.

Mary Anne McKellar
Vice-Chair, Board of Inquiry